

1 H51dwhis

Sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA, New York, N.Y.

5 v. 15 Cr. 0537(VEC)

6 DARRYL WHITLEY,

7 Defendant.
-----x

8 May 1, 2017
9 1:17 p.m.

10 Before:

11 HON. VALERIE E. CAPRONI,

12 District Judge

14 APPEARANCES

15 JOON H. KIM
16 Acting United States Attorney for the
Southern District of New York
17 BY: ANDREW ADAMS
Assistant United States Attorney

18 MICHAEL K. BACHRACH
19 Attorney for Defendant
- and -
ADAMS & COMMISSIONG LLP
20 BY: KARLOFF C. COMMISSIONG

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1 THE CLERK: United States of America versus Darryl
2 Whitley. All counsel, please identify yourselves for the
3 record.

4 MR. ADAMS: Good afternoon, your Honor. Andrew Adams
5 for the government.

6 THE COURT: Good afternoon, Mr. Adams.

7 MR. BACHRACH: Good afternoon, your Honor. Michael
8 Bachrach for the defendant Darryl Whitley as well as my
9 co-counsel on this case, Karloff Commissiong.

10 MR. COMMISSIONG: Good afternoon, your Honor.

11 THE COURT: Good afternoon.

12 Good afternoon, Mr. Whitley. I'm sorry to keep you
13 waiting.

14 THE DEFENDANT: Good afternoon, your Honor.

15 THE COURT: OK. Mr. Whitley's plea was entered in
16 front of the magistrate judge. I have reviewed the transcript
17 of the plea, and I now accept that guilty plea. I find that
18 there was an adequate factual basis for the plea, that
19 Mr. Whitley understood the rights he was giving up and waived
20 those rights knowingly and voluntarily. I find Mr. Whitley
21 understood the consequences of his plea, including the
22 potential sentence that might be imposed, and agreed to forfeit
23 the proceeds of the crime.

24 Because I find that his plea was entered knowingly and
25 voluntarily and was supported by an independent factual basis

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1 for each and every element of the crime charged, I accept his
2 guilty plea.

3 All right. Mr. Bachrach, have you and your client
4 read the presentence report dated March 24, 2017?

5 MR. BACHRACH: Yes, we have, your Honor.

6 THE COURT: And have you discussed it with each other?

7 MR. BACHRACH: Yes, your Honor.

8 THE COURT: Mr. Whitley, have you read the presentence
9 report or has someone read it to you?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: And did you discuss it with your lawyer?

12 THE DEFENDANT: Yes.

13 THE COURT: OK. Are there any objections to the
14 report, Mr. Bachrach?

15 MR. BACHRACH: No, your Honor. All the objections
16 were taken account of in the last submission.

17 THE COURT: OK. The presentence report will be made
18 part of the record in this matter and placed under seal. If an
19 appeal is taken, counsel on appeal may have access to the
20 sealed report without further application to the Court.

21 I received a sentencing submission from the defense,
22 dated April 2, 2017, that included letters from a number of
23 friends of the defendant. If any of you wrote me, thank you
24 very much. I read all of your letters.

25 I received a supplemental submission on April 17 that

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1 included a letter from the defendant dated April 6. Thank you
2 very much. I read your letter as well.

3 THE DEFENDANT: You are welcome.

4 THE COURT: I received a letter from the government
5 dated February 14, 2017, and a letter dated January 5 that laid
6 out the government's view of the relative culpability of this
7 defendant compared to his other codefendants. That letter puts
8 this defendant in the eighth tier, which is at the bottom of
9 the scale of culpability.

10 The next step is a guidelines calculation.

11 MR. BACHRACH: Your Honor, I am sorry. I just wanted
12 to make sure you did receive all the documents because there is
13 one you did not mention, the mitigation report --

14 THE COURT: I received that. That was attached to
15 your submission.

16 MR. BACHRACH: Thank you, your Honor.

17 THE COURT: I did.

18 OK. The next step is a guidelines' calculation. To
19 the family members and friends, this is going to sound like a
20 little bit of gobbledegook but it is required.

21 So the defendant pled guilty to one count of
22 conspiracy to violate the racketeering laws. In the context of
23 that conspiracy, the defendant admitted participating in the
24 robbery of a Chase Bank in LaGrange, New York in January 2016.

25 Pursuant to 2E1.1, the base offense level for

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1 racketeering is 19, or the base offense level of the underlying
2 crime, whichever is greater. In this case the underlying crime
3 is robbery, and the base offense level for robbery is found at
4 2B3.1(a). It is 20. That's greater, so that's the base
5 offense level.

6 The property of a financial institution was taken, so
7 pursuant to 2B3.1(b)(1), that's plus two.

8 Mr. Whitley pled guilty so he gets credit for
9 acceptance of responsibility. That's minus three. That brings
10 us to a total of 19.

11 Mr. Whitley has no prior criminal history so he is in
12 Criminal History Category I.

13 Level 19, Criminal History Category I yields a
14 guideline range of 30 to 37 months.

15 My understanding is that Mr. Whitley has been in
16 custody for approximately 15 months between state and federal
17 custody; is that correct?

18 MR. ADAMS: That is correct, your Honor.

19 THE COURT: All right. Are there any guidelines
20 arguments that I haven't addressed, Mr. Adams?

21 MR. ADAMS: No, your Honor.

22 THE COURT: Mr. Bachrach?

23 MR. BACHRACH: No, your Honor.

24 THE COURT: All right. I don't see a grounds under
25 the guidelines for a departure.

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1 Are there any factual issues in dispute?

2 MR. ADAMS: None for the government.

3 MR. BACHRACH: No, your Honor.

4 THE COURT: OK. Would the government like to be heard
5 on sentence?

6 MR. ADAMS: Your Honor, very briefly. Our January
7 letter lays out Mr. Whitley's relative culpability. He is at
8 the bottom of the stack here. Much like Mr. Geronimo, whom the
9 Court previously sentenced in this case, this is sort of an
10 incident that was serious but does strike us as at least
11 somewhat aberrational. Mr. Whitley has one prior conviction
12 for disorderly conduct previously, but he is certainly not
13 among the members of the YGz with ample prior violence or
14 anything like that.

15 So I certainly don't want to overstate the case with
16 respect to Mr. Whitley, but I do, as with respect to all of the
17 other members of the bank robbery conspiracy, want to reiterate
18 both for the Court and for the defendant that this was a
19 terrifying experience for the people inside these banks. Even
20 though these were unarmed robberies, the people inside the
21 banks had no idea that that was the case. They were afraid for
22 their safety, for their lives. And the relatively small amount
23 of money that was obtained in the course of this bank robbery
24 doesn't mitigate that in any way. That is a matter of luck,
25 largely, but also I think reflects some sort of the pettiness

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of this whole scheme generally. To put people in that amount of fear for such a small payout I think speaks to a real lack of moral compass with respect to everyone involved in this case.

THE COURT: Thank you, Mr. Adams.

Mr. Bachrach, would you like to be heard?

MR. BACHRACH: Yes, your Honor, and I will try to keep it brief as well, as I feel like I can for the most part rely upon the written submissions, particularly in light of Mr. Whitley's what I believe to be powerful letter that he wrote entirely on his own.

The government just really put it perfectly. This was aberrational. Mr. Whitley, unlike everyone else in the indictment, Mr. Whitley was not a member of the YGz organization. The government specifically stated that during his plea allocution. He was an associate, which legally means the same thing, because legally you are convicted of racketeering regardless of whether you are a member or associate.

But as far as what it means for him as a person individually under 3553(a), there is a significant difference. It means that on a brief period of his life, without joining -- he didn't join a gang, but for a brief period of his life, he joined a couple of low-level members of that gang in one very discrete act, a mistake, a huge mistake. In fact, there were

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1 probably a couple of other small discrete acts along the way,
2 because you have to have a conspiracy, you have to have an
3 agreement before you do it. But these were incredibly
4 aberrational. This wasn't him as the full picture of him.

5 And we know that because of the family support that he
6 has. And in this room we have his mother, we have his sister,
7 we have his brother, we have his girlfriend, and we also have
8 even Ms. Melendez from The Consulting Project. We have
9 approximately ten letters, I believe, that were submitted, not
10 including his own, which show the strong family support and the
11 friends that support him as well. That's important, because if
12 he was some gangbanger, if he was a member of this dangerous
13 YGz organization, I suspect you wouldn't see the type of
14 opportunity -- the type of support he has and the type of
15 opportunities that he is going to have once he is finally
16 released.

17 Eagle Academy has offered him a job once he gets out.
18 That job will allow him to be a mentor to at-risk youth, and
19 allow him to take his bad experience and take his mistakes and
20 make something good out of them by making sure that other young
21 youth who are in a similar situation that he had been don't
22 make the same mistake that he did. He has that opportunity, if
23 given by your Honor, and I think, your Honor, he deserves it
24 greatly.

25 Comparing him to Mr. Geronimo is also a very good

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1 point. Mr. Geronimo, who is listed by the government in that,
2 just like Mr. Whitley, as that bottom tier defendant, although
3 he is listed as a low-level member. I think every defense
4 attorney likes to come in and say that their client is the
5 lowest guy in the rung. Well, Mr. Whitley really is. Because
6 Mr. Geronimo was a low-level member and he's in the same
7 paragraph, the last paragraph, the last tier, but Mr. Whitley
8 isn't even a low-level member, so he is even less you can say
9 morally culpable in comparison, or less -- beyond simply the
10 act of the robbery, he has even less involvement than
11 Mr. Geronimo.

12 And Mr. Geronimo, however, is a perfect parallel of
13 defendants to compare him to since under 3553(a), one thing
14 your Honor needs to avoid is unwarranted sentencing
15 disparities. Mr. Geronimo, like Mr. Whitley, is a first-time
16 criminal offender. He is a criminal history category of I. He
17 was involved, like Mr. Whitley, with only one robbery. And
18 Mr. Geronimo received a sentence of time served. To avoid
19 unwarranted sentencing disparities, we believe it is
20 appropriate to also give a sentence of time served to
21 Mr. Whitley.

22 There are additional considerations that would advance
23 that as well. Your Honor, if this sentencing were to take
24 place after November 1st of this year -- and I understand the
25 guidelines haven't changed yet, but effective November 1st of

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1 this year, his guideline range will actually be one point lower
2 because of the fact that he is a first-time criminal offender.

3 So his guideline range -- the bottom of his guideline range
4 would be 27 months, not 30 months.

5 Additionally, your Honor, the BOP is not going to give
6 him credit for the five months he served in state custody.

7 THE COURT: Yes, they will. The presentence report as
8 written said that they will.

9 MR. BACHRACH: Your Honor, I hope you are right. In
10 my experience that's not always the case because of the fact
11 that the prior arrest was for a different charge. And that
12 that's a considerable risk, because it was for a different
13 charge. Even though he was certainly, as far as he knew,
14 arrested for the same thing, he was interrogated only for this,
15 but that is a concern we have.

16 Nevertheless, your Honor, with his background, with
17 the fact that he actually fully accepts responsibility, and not
18 only that, legitimately he is remorseful, as is evidenced by
19 his letter. In his letter he talks about not wanting to make
20 excuses, but the reason he doesn't want to make excuses, which
21 he is really talking about mitigation, which your Honor knows
22 is not an excuse but to many people they don't understand the
23 difference. But what he's really saying is that he understands
24 that he committed a significant crime, and he doesn't want to
25 excuse -- he doesn't want to make an excuse in a manner that

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1 would denigrate that crime or the victims. He wants to take
2 responsibility because he really realizes that it was a
3 mistake.

4 So, your Honor, I think one last -- the only last
5 thing I would just add is that when I talk about the support
6 that is going to take place, that he is going to have, the gang
7 operated in the Bronx. Mr. Whitley and his family now live
8 just a few blocks from here, your Honor, in downtown Manhattan,
9 on the Lower East Side. He is now separated physically from
10 the bad influences that were negatively impacting him in the
11 past. Yet another reason -- another reason to believe that now
12 that he has -- if he is given this opportunity by your Honor,
13 he truly will live up to the commitments that he states in his
14 written submission.

15 Thank you, your Honor.

16 THE COURT: Thank you, Mr. Bachrach.

17 Mr. Whitley, would you like to be heard?

18 THE COURT: You can just stand. You can stand
19 straight up. The mic will hear you. It is a good mic.

20 THE DEFENDANT: My back would hurt.

21 I just want to say that I want to apologize to the
22 victims of the crime. I take full responsibility for that.

23 I want to thank my family for their love and support,
24 and the mitigation of my lawyers. And I just want to say I
25 failed as a son, a brother and a father, but hopefully I get

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1 back together and make everything right.

2 MR. BACHRACH: He's a little nervous, your Honor, but
3 I think that's all he wants to say.

4 THE COURT: Thank you, Mr. Whitley. I think that was
5 what you needed to say.

6 THE DEFENDANT: Thank you.

7 THE COURT: All right. Mr. Whitley, under federal
8 law, I'm required to consider the nature and circumstances of
9 the offense and the history and characteristics of the
10 defendant in deciding your sentence. In terms of you, I've
11 considered your history and your characteristics.

12 I start with the fact that you had a challenging
13 childhood. Your father was incarcerated for murder from the
14 time you were 10. Your mother was a single parent raising five
15 children. And you have learning disabilities and are ADHD.

16 That said, it appears to me that your mother was a
17 positive role model. She was employed. She took efforts to
18 keep you engaged to overcome your difficulties. You told me
19 about gymnastics. I can see that would be a good thing to run
20 some energy off of a kid that has ADHD, and you got to go to
21 New Hampshire with the Fresh Air Fund. She put you in Catholic
22 school for a little time as well, and I gather you went to
23 Eagle Academy, which looks like a really good program. Put
24 differently, although you grew up poor, you were really dealt a
25 better hand and you had a more engaged mother than many people.

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I note that you have a child who is six years old. Several of the people who wrote me talk about the fact that you were an actively engaged father who shared custody with your son's mother of your child.

I have considered that you have no real prior convictions and you were a bit player in this gang. You apparently only participated in one bank robbery and that as the getaway driver, although you certainly were aware that other robberies were going to be or had been committed. I've also considered the fact that your employment history is, at best, limited, and you have not yet gotten your GED.

In addition to all of that sort of history and circumstances of the defendant, as well as the guideline range, I am required to impose a sentence that is reasonable and no greater than necessary to accomplish the goals of sentence. I have considered all of the required factors.

Among the most important I have considered starts with the seriousness of the offense. I appreciate that you only committed one robbery and you got relatively little money, but the amount of proceeds was not really within your control.

And I also appreciate that while an unarmed bank robbery is less serious than an armed bank robbery, I agree with Mr. Adams that the people in the bank did not know that it was an unarmed robbery, and I am confident that they were absolutely petrified.

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I have considered the need to provide just punishment for this offense while avoiding unwarranted disparities. I have taken into account the fact that I have more than 30, I think, Young Gunnaz to sentence and that many were engaged in far, far more serious crimes than this one. I view you, Mr. Whitley, as most similar to Mr. Geronimo and Mr. Gallimore.

I have considered the need to deter criminal conduct. Mr. Whitley, deterrence has two aspects -- specific deterrence, meaning deterring you, and general deterrence, meaning deterring society at large. In terms of specific deterrence, I am concerned that the lure of the street is going to be strong. I think it's helpful that you are no longer living up in the Bronx and that you are now down on the Lower East side, but you are going to have to be vigilant to avoid getting back with your old buddies or falling in with people on the Lower East Side who are doing the same thing. That's going to be on you. You've got to have the strength of character to say I've spent 15 months in jail and I don't ever want to go to jail again. And that's on you.

I am struck by the fact that two of the people who wrote to me, your sister Tiffany -- is Tiffany here?

A SPECTATOR: No.

THE COURT: OK. And Carol Ford, who is a friend of yours, wrote about the hope that you will not continue the cycle of sons not having their father present. I agree that

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1 the statistics are heartbreaking.

2 That choice, Mr. Whitley, is entirely in your hands.

3 If you want to be there for your little boy, you can be there.

4 But you've got to do it.

5 In terms of general deterrence, I think it is
6 important to send a message far and wide that the sort of
7 criminal conduct that you got involved in, organized criminal
8 conduct, that terrorizes and destroys neighborhoods has got to
9 stop. It's incumbent on everybody, young men, to avoid the
10 pull; young women, who will say to their young men, no, don't
11 do it, get away, but that message has got to be sent -- that if
12 you get involved with this sort of criminal conduct, you are
13 going to spend substantial years -- not months, but years -- in
14 federal prison.

15 Now, I've considered the need to provide you with
16 needed educational or vocational training, medical care, or
17 other correctional treatment. In terms of you, Mr. Whitley, I
18 see three needs, which I think you recognize each of them, and
19 that's positive.

20 In terms of education, I entirely endorse the notion
21 that you need to get your GED. But I would say you also need
22 to learn a trade or other employable skills. Learn how to do
23 something so that you can get out of minimum-wage jobs. Get a
24 job that will pay you well. There are a lot of apprenticeship
25 programs in this city that will teach you a trade, and I

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1 recognize that your antsy and that you've got attention
2 deficit, but you know what, if you are working on a site and
3 you're learning how to do electrical work or plumbing or things
4 like that, that is going to keep you engaged, and I think you
5 can do that if you try. So I encourage you to do that.

6 I think you need drug treatment. I think you have
7 been self-medicating and that's a problem. It is very
8 difficult to stay out of trouble and to stay employed and be a
9 good role model for your little boy if you are strung out on
10 drugs. So you've got to deal with your drug problem.

11 And I also am going to say it is mental health but I
12 don't know what the standard of care is for an adult who has
13 ADHD. I don't know whether they still say the best answer is a
14 drug like Ritalin or Adderall or something like that, but
15 whatever it is, you need to get it so that you can stay focused
16 and stay out of trouble.

17 Taking all of this into account and the fact that you
18 have already served 15 months in jail and you are a first
19 offender, I do not think further jail time is necessary to
20 satisfy the goals of sentencing. So I'm going to sentence you
21 to time served and three years of supervised release.

22 Mr. Whitley, I want you to consider supervised release
23 not as punishment, although it is an aspect of punishment, but
24 use your probation officer to help you. They will know about
25 programs that can be helpful. So think of it, think of your

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probation officer as someone who can help you, and I think that will (a) make the three years go faster and (b) it will make you more successful with your supervised release.

There are mandatory conditions of supervised release.

You must not commit another crime. You may not illegally possess a controlled substance. You cannot possess a gun or other destructive device.

I am going to suspend mandatory drug testing because I am going to order drug treatment as part of your supervised release.

You must cooperate in the collection of DNA.

In addition to the standard conditions of supervision, I am imposing the following special conditions:

You must submit your person, residence, place of business, vehicle, or other premises or electronic devices under your control to search if the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of release may be found there. Any search must be conducted in a reasonable time and in a reasonable manner.

Failure to submit to a search may be grounds for revocation, and you must inform the other residents of the premises that they may be subject to search pursuant to this condition.

You must participate in outpatient drug treatment as approved by your probation officer, which may include testing

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1 to determine whether you have reverted to the use of drugs or
2 alcohol. You must contribute to the cost of services based on
3 your ability to pay and the availability of third-party
4 payment.

5 The court authorizes the release of drug treatment
6 evaluations and reports, including the plea sentence report, to
7 the drug treatment provider.

8 The defendant must participate in an outpatient mental
9 health treatment program as directed by the probation officer.
10 You must continue to take any prescribed medication unless you
11 are otherwise instructed by your mental health provider. Here
12 again, you must contribute to the cost of services rendered
13 based on your ability to pay and the availability of
14 third-party payments.

15 The Court authorizes the release of available
16 psychological and psychiatric evaluations and reports,
17 including the presentence report, to the healthcare provider.

18 You must perform 100 hours of community service for
19 every year on supervised release.

20 Community service must be approved by the probation
21 officer, and I am going to recommend that it be focused on
22 working with at-risk youth.

23 I am going to ask you to write me a letter every six
24 months telling me how you are doing. You have the ability to
25 write a nice letter.

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1 THE DEFENDANT: Yes, I do.

2 THE COURT: So I want to know how you are doing. OK.
3 Your first letter is due October 30, 2017, and then every six
4 months after that.

5 You must provide your probation officer with access to
6 any financial information, and you may not incur new credit
7 card charges or open new lines of credit without the permission
8 of your probation officer unless you are in compliance with
9 your payment of restitution.

10 You must report to the nearest probation officer
11 within 72 hours of today.

12 You must be supervised by the district of residence.

13 Mr. Adams, I was given an order of restitution, and
14 the amount on it does not match what was in the probation
15 report, so which is correct?

16 MR. ADAMS: This is correct, your Honor. The
17 difference has to do with the amount that was previously seized
18 from Mr. Whitley. So, the amount in the order -- and I am
19 asking for this both for restitution and for forfeiture
20 purposes -- is the amount that was taken less \$380.

21 THE COURT: Less what was already recovered?

22 MR. ADAMS: Correct. So \$5,370.

23 THE COURT: So I am ordering you to pay restitution in
24 the amount of \$5,370, and ordering you to forfeit \$5,370. That
25 amount is joint and several, meaning you and the other people

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1 involved in that robbery are responsible for that amount of
2 money. That is not all on you.

3 I am not imposing a fine because I find there is no
4 ability to pay a fine.

5 I must impose a \$100 special assessment.

6 MR. BACHRACH: Your Honor, can I have a minute with
7 the prosecutor? I apologize.

8 THE COURT: Sure.

9 MR. BACHRACH: Thank you.

10 (Pause)

11 Thank you, your Honor. I just wanted to ask, because
12 I only looked at that restitution order very briefly. I just
13 wanted to make sure that restitution and forfeiture are both
14 imposed jointly and severally with the codefendants that were
15 also implicated on that January 29th robbery.

16 THE COURT: I think that all of the financial
17 requirements are joint and several; correct, Mr. Adams?

18 MR. ADAMS: That is correct, your Honor. We are
19 asking that that be the case for everybody in the case.

20 THE COURT: OK.

21 MR. BACHRACH: Thank you.

22 THE COURT: It is not going to incur interest.

23 MR. BACHRACH: Thank you, your Honor.

24 THE COURT: OK. I am not imposing a fine because
25 there is no ability to pay.

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1 I must impose a \$100 special assessment.

2 Are there any open counts?

3 MR. ADAMS: Your Honor, we move to dismiss any open
4 counts and underlying instruments.

5 THE COURT: They are dismissed.

6 All right. Mr. Whitley, to the extent you have not
7 given up the right to appeal through your plea of guilty and
8 the agreement you entered into with the government in
9 connection with that plea, you have the right to appeal. If
10 you are unable to pay the cost of an appeal, you may apply for
11 leave to appeal in forma pauperis. The Notice of Appeal must
12 be filed within 14 days of the judgment of conviction.

13 Anything further, Mr. Adams?

14 MR. ADAMS: Nothing here, your Honor.

15 THE COURT: Mr. Bachrach.

16 MR. BACHRACH: Just a brief clarification. The letter
17 that you would like Mr. Whitley to send every six months, would
18 you like him to send it directly to your Honor, or do you want
19 him to send it to me first and I will forward it?

20 THE COURT: He should send it directly to me. We will
21 give him the address.

22 MR. BACHRACH: Thank you, your Honor.

23 THE COURT: You are going to be relieved of your duty
24 to supervised him.

25 Mr. Whitley, every six months I want to hear from you.

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1 I want to hear how you are doing. I want to hear how your
2 little boy is. I want to hear that you got a job. OK?

3 THE DEFENDANT: Thank you, your Honor.

4 THE COURT: All right. Thank you all and good luck.

5 MR. BACHRACH: Thank you, your Honor.

6 MR. ADAMS: Thank you, your Honor.

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